ARIZONA COURT OF APPEALS

DIVISION TWO

CARL T. SANDBERG, JR. and GEETA GAJWANI SANDBERG; and SANDBERG TRUST, CARL AND GEETA SANDBERG, Trustees,

Plaintiffs/Appellants,

v.

PIMA COUNTY; TUCSON ELECTRIC POWER COMPANY; COX COMMUNICATIONS, INC.; and VERIZON (VAW),

Defendants/Appellees.

Court of Appeals
Division Two
No. 2 CA-CV 2023-0189

Pima County
Superior Court
No. C20201732

ANSWERING BRIEF OF DEFENDANTS/ APPELLEES COX COMMUNICATIONS, INC.; TUCSON ELECTRIC POWER CO.; AND PIMA COUNTY

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INTRODUCTION

This is a case about a utility tower placed within Pima County's right-of-way easement. The owners of nearby property sued the County and three utilities, asserting inverse taking, trespass, and declaratory judgment claims. These claims suffer from several fundamental problems.

First, these plaintiffs lack standing because the utility tower is not on their land. They have no standing to assert property-based claims for alleged intrusions onto someone else's property.

Second, their claims are barred by the statute of limitations because the road and the County's easement have existed for decades.

Third, the claims fail on the merits. The utility tower is within the County's right-of-way easement and the County properly authorized utilities to place the tower within the right-of-way under A.R.S. § 40-283.

Over two years into the case, after summary judgment was briefed and argued, the plaintiffs tried to amend their complaint. The superior court acted within its broad discretion in denying the amendment because of undue prejudice and futility.

The Court should affirm.

STATEMENT OF FACTS AND CASE

I. Residents petitioned to create Sunset Road.

In 1930, ten residents petitioned Pima County to establish a public road along their properties in accordance with the existing statutes at the time. [ROA 92 ep 3, ¶ 5; *id.* ep 7-24; ROA 115 ep 6.] Consistent with the statute, the board of supervisors surveyed the proposed highway, provided notice to the affected residents, held hearings, assessed just compensation, and passed a resolution establishing Sunset Road. [ROA 92 ep 3-4, ¶ (6)(b)-(f); *id.* ep 12-18.] In 1932, Sunset Road's 60-foot right-of-way was recorded in the Pima County Recorder's office. [*Id.* ep 4, ¶ 6(g); *id.* ep 20-24.]

By 1962 at the latest, the County paved 30 feet of Sunset Road and has consistently maintained the road. [ROA 90 ep 2-3, ¶¶ 13-14; ROA 92 ep 5, ¶¶ 8-9; ROA 93; ROA 115 ep 6.]

II. The Sandbergs purchased their properties in 1986 and 1998.

In 1986 and 1998, Plaintiffs/Appellants Carl and Geeta Sandberg purchased two properties along Sunset Road. [ROA 95 ep 16-18.] As explained in detail below (Argument § III.A.2), all the deeds in the Sandbergs' chains of title conveyed the land "subject to" or "except" for Sunset Road (e.g., "SUBJECT TO: … [e]stablished and existing roads,

highways and easements and particularly West Sunset Road including the north 30 feet of said property" [ROA 95 ep 9]). Moreover, the deeds did not directly convey any property within the 60-foot right-of-way (either the 30-foot paved portion or the unpaved shoulders). They conveyed only the "South 660 feet of the North 690 feet" (e.g., ROA 95 ep 16, 18), which leaves a 30-foot strip to the centerline (a 15-foot shoulder on the Sandbergs' side, and a 15-foot paved portion to the centerline). None of the deeds in the Sandbergs' chains of title conveyed inverse condemnation or trespass claims.

III. In 2019, Defendants installed a utility tower on the Sunset Road shoulder.

In 2019, Defendant/Appellee Pima County authorized Defendants/Appellees Cox, Tucson Electric Power, and Verizon ("Utility Defendants") to build a utility tower on the shoulder of Sunset Road. [ROA 119 ep 14-15.] The Sandbergs filed a notice of claim against the County with the adjacent property owner William Eastman, alleging legal theories of trespass, inverse condemnation, and zoning violations based on the tower's placement. [ROA 117 ep 33-38.]

IV. The lawsuit.

In April 2020, the Sandbergs sued the County and Utility Defendants for declaratory judgment, trespass, and inverse condemnation. [ROA 2.] The Sandbergs' claims relied on the premise that the utility tower was located on their properties. [ROA 10 ep 5, ¶ 21.] Specifically, the Sandbergs alleged that the County's authorization and the Utility Defendants' installation of the utility tower on the Sunset Road shoulder was a taking and a trespass, and they were entitled to an order compelling Defendants to cease use of Sunset Road "as it traverses any portion of the Properties," which it defined as the Sandbergs' property acquired in 1986 and 1998. [*Id.* ep 8-10, ¶¶ 37, 40, 48.]

A. In July 2020, the Williamses purchased the neighboring property on Sunset Road.

In July 2020, well after the tower was built, William Eastman, the Sandbergs' next-door neighbor, sold his property to Donald and Leann Williams. [ROA 95 ep 70-73; ROA 96 ep 91.] The tower is located on the Sunset Road shoulder north of the Williamses' property, not the Sandbergs' properties. [ROA 96 ep 95-96.]

Mr. Eastman conveyed the Williamses the "East 220 feet of the South 660 feet of the North 690 feet" (i.e., again excluding the paved road and unpaved shoulder), subject to the same exceptions as the Sandbergs' deeds. [ROA 95 ep 70-73.] Mr. Eastman didn't convey the Williamses any claims regarding the property.

B. After the litigation commenced, the Williamses assigned their claims to the Sandbergs.

The Sandbergs obtained a written assignment of claims from the Williamses on November 21, 2020 (after the case began) for all claims involving the utility tower:

> We, Donald M. Williams and Leann Williams, husband and wife, hereby assign our claim for the 2019 installation of the large cell tower on Sunset Road and Sunray Drive against Verizon, Tucson Electric Power Company, Cox Communications, and Pima County to our neighbors Carl and Greeta Sandberg, Individually and as Trustees of the Sandberg Trust.

[ROA 117 ep 8.]

C. The superior court granted Defendants' summary judgment motion and denied the Sandbergs' motion to amend.

Defendants moved for summary judgment, arguing that the Sandbergs' claims were barred by the statute of limitations because Sunset Road was created decades before the Sandbergs purchased their properties. [ROA 89 ep 2.] The Utility Defendants also argued that they were entitled

to summary judgment because A.R.S. § 40-283(D) allows the County to authorize placement of utilities within the right-of-way. [ROA 101 ep 2.]

After summary judgment was fully briefed and argued, but before the court issued its decision, the Sandbergs filed a motion to amend their complaint. [ROA 135.] The Sandbergs' proposed second amended complaint asserts inverse condemnation, trespass, declaratory judgment, and nuisance and zoning claims on behalf of themselves and their assignees. [*Id.* ep 14, 19-21.] Utility Defendants opposed the Sandbergs' motion to amend arguing that the proposed second amended complaint was futile, prejudicial, and unduly delayed. [ROA 141 ep 2-3; ROA 148 ep 8-9.]

The court considered the motions in tandem and granted Defendants' summary judgment motion, finding that the County properly authorized the utilities to operate within the Sunset Road right-of-way based on *Maricopa County v. Rovey*, 250 Ariz. 419 (App. 2020) and A.R.S. § 40-283(D). [ROA 165 ep 2-3.] The court also rejected the Sandbergs' claim for prescriptive rights to the Sunset Road shoulder. [*Id.* ep 4.] Finally, the court rejected the Williamses' assignment of claims because they purchased their property after the tower was built in 2019. [*Id.*] The superior court therefore found that the Williamses had no takings claims to assign because "[a] claim for

inverse condemnation is personal and does not pass to a grantee unless the grantor expressly conveys it." [*Id.*]

The Sandbergs twice moved for reconsideration of the court's decision. [ROA 180; ROA 196.] The court denied the Sandbergs' motions, finding that *Rovey* created "at minimum, an easement for road purposes to the County," and "there is no real dispute that the County has minimally, an easement for the right-of-way over Sunset Road." [ROA 192 ep 2-3.] The court clarified that by rejecting the Williamses' assignment of claims it denied the Sandbergs' motion to amend. [ROA 2-S ep 4.]

D. The superior court entered judgment in favor of Defendants.

The court concluded that the Sandbergs and Williamses had no claims against the Defendants for the installation of the utility tower on the Sunset Road shoulder. [ROA 165 2-4.] The court entered judgment against the Sandbergs. [ROA 195 ep 2.]

The Sandbergs filed their second motion for reconsideration after entry of judgment, and then filed a notice of appeal. [ROA 196; ROA 200.] This Court revested jurisdiction in the superior court, which denied the motion, and then this Court reinstated jurisdiction. It has jurisdiction under A.R.S. § 12-2101(A)(1).

STATEMENT OF THE ISSUES

1. Do the Sandbergs have standing when their claims are based on an alleged encroachment onto someone else's property?

2. Are the Sandbergs' claims barred by the statute of limitations?

3. May a county authorize utilities under A.R.S. § 40-283 within a valid right-of-way easement?

4. Did the superior court abuse its discretion in denying leave to amend?

STANDARD OF REVIEW

This Court reviews de novo the superior court's grant of summary judgment and will affirm if the superior court's judgment "was correct for any reason." *Craven v. Huppenthal*, 236 Ariz. 217, 218-19, ¶ 5 (App. 2014). The Court reviews the "denial of a motion to amend … for an abuse of discretion." *Deutsche Bank Nat'l Tr. Co. v. Pheasant Grove LLC*, 245 Ariz. 325, 331, ¶ 19 (App. 2018).

ARGUMENT

I. The Sandbergs lack standing because the utility tower is not on their properties.

The simplest way for the Court to resolve this appeal is to find that the Sandbergs lack standing to bring their claims. This is a case about a utility

tower, but the complaint suffers from a fatal flaw. The utility tower is not located on the Sandbergs' properties. It's on the shoulder abutting *their neighbor's* property. The Sandbergs have therefore suffered no injury and lack standing.

Defendants moved to dismiss the Sandbergs' claims arguing that they failed to plead an essential element because the tower was not located on their properties. [ROA 39 ep 10-11.] Defendants also raised the issue on summary judgment. [ROA 131 ep 9.] Although the superior court granted summary judgment on different bases, this Court can "affirm a grant of summary judgment if the superior court was correct for any reason." *Craven*, 236 Ariz. at 218-19, ¶ 5.

A. Arizona generally requires plaintiffs to have standing.

Although the Arizona Constitution does not have a "case or controversy" requirement to establish standing, Arizona courts consistently require a plaintiff to "first establish standing to sue." *Bennett v. Brownlow*, 211 Ariz. 193, 195, ¶ 14 (2005). The standing doctrine requires that "issues be fully developed between true adversaries." *Id.* Thus, to establish prudential standing, plaintiffs must show "a particularized injury to themselves." *Id.* at 196, ¶ 17.

B. The Sandbergs' claims all rely on the placement of the utility tower, but the tower is not located on their properties.

According to the operative complaint, the Sandbergs' claims (taking, trespass, and declaratory judgment) all stem from the County permitting the Utility Defendants to "install improvements or locate items of personal or physical property on or across portions of each of the Properties without the approval or consent of the Landowners." [ROA 10 ep 5, ¶ 21.] The Sandbergs defined "Properties" to include only the parcels they own. [*Id.* ep 1-2, ¶ 2.] The Sandbergs' claims rely entirely on the premise that the utility tower is located on their properties:[1]

- "The County's taking of the Sunset Road alignment and the installation of improvements over, across and abutting the Properties constitutes a violation of Article 2, § 17 of Arizona's Constitution." [*Id.* ep 10, ¶ 48.]
- "[T]he placement of improvements … within the Sunset Road Alignment as it traverses the Properties constitutes a continuing and wrongful trespass." [*Id.* ep 7, ¶ 40.]
- "Landowners are also entitled to an order compelling … the County, TEP, Cox, and Verizon cease use of Sunset

[1] In opposition to summary judgment, the Sandbergs clarified that "contrary to the County's contention, Plaintiffs do not seek to interfere with the public's use of the traveled portion of Sunset Road. Instead, it is the Defendants' use of the Unimproved Area that is the focus of Plaintiff's claims." [ROA 126 ep 3.]

> Road as it traverses any portion of the Properties." [*Id.* ep 6, ¶ 37.]

The superior court denied the motion to dismiss because it was "not entirely clear" that "these activities … occur in the portion of the roadway that lies on" the Sandbergs' properties, but it drew "inferences in the Sandbergs' favor." [ROA 43 ep 4.]

By summary judgment, the record was clear, and there is now no dispute that the tower is not on the Sandbergs' properties. In opposing summary judgment, the Sandbergs attached an annotated version of Verizon's tower installation plan showing the location of the tower adjacent to the Williamses' property, not the Sandbergs' properties. [ROA 126 ep 22.] Mrs. Williams further admitted that that the utility tower was located "entirely within the east-to-west boundaries of Sunset Road to the north of [their] property (not the Sandbergs' properties)." [ROA 96 ep 96.]

This does not depend on any dispute about rights to the unpaved shoulder. Even if the Sandbergs have exclusive rights to the unpaved shoulder abutting their properties, the utility tower still is not on their properties; it is on the shoulder abutting *their neighbors' property*. The Sandbergs therefore have suffered no injury to support their claims. Indeed,

the "harm" suffered by the Sandbergs is no different than others who use the Sunset Road shoulder. *See Arcadia Osborn Neighborhood v. Clear Channel Outdoor, LLC*, 256 Ariz. 88, 93 ¶¶ 12-13 (App. 2023) (no standing for harms related to traffic safety, loss of aesthetic value, and visibility, when plaintiffs failed to "show a particularized harm that is not shared by others who regularly travel through" the area where the billboard is located).

Simply put, a party has no standing to bring a taking, trespass, or declaratory judgment claim about a neighbor's property. The tower is not located on the Sandbergs' property—under any construction of their rights—so they lack standing. The Court need not go further and should affirm on this basis alone.

II. The Sandbergs' claims are barred by the statute of limitations.

The Sandbergs' claims rely on what rights the County has over the Sunset Road right-of-way and whether those rights permit authorization of the utility tower on the Sunset Road shoulder. [ROA 10 ep 3, ¶ 11 ("This case involves the issue of whether the County properly created and obtained the right to use the south half of Sunset Road.").] But any claims involving Sunset Road's creation are time-barred.

Although the superior court did not resolve Defendants' summary judgment motion on statute of limitations grounds, the Sandbergs have raised it as an issue on appeal (OB, 12/28/2023 ep 42-52), and it presents another independent basis for this Court to affirm, which was raised and fully briefed below. [ROA 89 ep 5-11; ROA 115 ep 8-21.]

A. The Sandbergs' trespass claim is time barred because a public road is a permanent trespass.

A claim against the County must be brought within one year of the cause of action accruing. A.R.S. § 12-821.[2] A cause of action accrues under A.R.S. § 12-821 when "the damaged party realizes he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality or condition which caused or contributed to the damage." A.R.S. § 12–821.01(B); *accord Humphrey v. State*, 249 Ariz. 57, 66, ¶ 30 (App. 2020) ("[A] claim accrues when the party either knew or should

[2] Citing A.R.S. § 28-7052, the Sandbergs argue that the "applicable limitation period is at least two years" for their inverse condemnation claim. [OB, 12/28/2023 ep 46.] *See* A.R.S. § 28-7052 ("An action brought to recover possession of or to clear title to real property claimed by this state or by a political subdivision of this state as a public highway … shall be commenced within two years after the cause of action has accrued."). But § 12-821's one-year period applies to all claims against a public entity, "regardless of the tort." *Watkins v. Arpaio*, 239 Ariz. 168, 173, ¶ 18 (App. 2016).

have known to investigate the defendant's potential liability for the injury."). Against the Utility Defendants, a trespass claim must be brought within two years. A.R.S. § 12-542(3) (actions "[f]or trespass for injury done to the estate or the property of another … shall be commenced and prosecuted within two years after the cause of action accrues.").

When a trespass claim accrues depends on whether the trespass is permanent or continuing. *Rovey*, 250 Ariz. at 425, ¶ 17 (citation omitted). A trespass is permanent when the trespass occurs due to the "inherent character of a structure" and "its lawful *and necessary* operation creates a permanent injury." *Id.* ¶ 18 (emphasis added). A permanent trespass claim "accrues when the trespass begins." *Id.* ¶ 17 (citation omitted). A continuing tort is a "series of closely related wrongful acts." *Watkins*, 239 Ariz. at 171, ¶ 9. A continuing trespass claim "does not accrue until the conduct has ended." *Rovey*, 250 Ariz. at 425, ¶ 17 (citation omitted).

In Arizona, "the presence of [a] [d]isputed [r]oad[] is a permanent trespass," and the claim accrues when the "[r]oad was created." *Id.* 425, ¶ 19. This type of trespass is permanent, personal, and does not run with the land:

> [I]f one, without the privilege to do so, enters land of which another is in possession and … makes some other excavation … the fact that the harm thus occasioned on the land is a continuing

> harm *does not subject the actor to liability for a continuing trespass*. Since his conduct has once for all produced a permanent injury to the land, the possessor's right is to full redress in a single action for the trespass, and *a subsequent transferee of the land, as such, acquires no cause of action* for the alteration of the condition of the land.

Restatement (Second) of Torts § 162 cmt. e (emphases added).

Here, there is no dispute that the County paved Sunset Road no later than 1962 and has maintained the road since. [ROA 90 ep 2-3, ¶¶ 13-14; ROA 115 ep 6.] The Sandbergs bought their properties decades later, in 1986 and 1998, and the previous owners did not convey any claims. [ROA 90 ep 1-3, ¶¶ 2-5, 17-18; ROA 116 ep 2.] Like the roads at issue in *Rovey*, Sunset Road was "in use and obvious" when the Sandbergs bought their properties. 250 Ariz. at 426, ¶ 23. If Sunset Road was a trespass, it was permanent, and any claim about its creation expired decades ago.

B. The subsequent purchaser rule and statute of limitations also bar the Sandbergs' inverse condemnation claim.

Like trespass claims, "[a] claim for inverse condemnation is personal and does not pass to a grantee unless the grantor expressly conveys it." *Id.* at 425, ¶ 22; *accord Boyd v. Atchison, T. & S. F. Ry. Co.*, 39 Ariz. 154, 159 (1931) ("[T]he damages belong to the owner at the time of the taking and *do not pass*

to a grantee of the land under a deed made subsequent to that time, unless expressly conveyed therein.").

This rule is consistent with long-settled law. *See, e.g.*, 2 Nichols, *Eminent Domain* (Rev. 3 ed.) § 5.21 (taking claim "does not run with the land" without assignment); 29A C.J.S. *Eminent Domain* § 237 (2023) ("do not pass to a subsequent grantee of the land"); 138 Am. Jur. *Proof of Facts* 3d § 301 (2023) ("owner of the property at the time of the taking who is entitled to compensation."). Other jurisdictions agree that subsequent purchasers cannot recover. *See, e.g.*, *United States v. Dow*, 357 U.S. 17, 18-21 (1958); *Brooks Inv. Co. v. City of Bloomington*, 232 N.W.2d 911, 918 (Minn. 1975); *Argier v. Nev. Power Co.*, 952 P.2d 1390, 1392-93 (Nev. 1998).

Here, the Sandbergs took title to their properties decades after Sunset Road was created for public use. [ROA 90 ep 1-2, ¶¶ 3, 5, 12-13.] None of the deeds in their chains of title conveyed the right to any claims. [*Id.* ep 3, ¶¶ 16-18; ROA 95 ep 9, 11, 13, 16, 18.] Any inverse condemnation claim for Sunset Road therefore belonged to the owner *when the road was created*. But that owner petitioned Pima County to establish Sunset Road in 1930. [ROA 16 ep 28 ("Ms Anna B. Nornabell 1103 E Elm" signed the petition).] As subsequent purchasers, the Sandbergs have no inverse condemnation claim

for Sunset Road. Moreover, because the Sandbergs had to assert their inverse condemnation claim against the County within one year of the cause of action accruing under A.R.S. § 12-821, the Sandbergs' claim expired decades ago and is barred by the statute of limitations.

The Sandbergs cite *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), and *Snow v. Calumet*, 512 P.3d 369, 373 (Okla. 2022), for the proposition that subsequent purchasers are not barred from asserting inverse condemnation claims. [OB, 12/28/2023 ep 56.] But *Palazzolo* expressly distinguished regulatory takings from physical takings, recognizing that the right to compensation for *physical takings* "is not passed to a subsequent purchaser." 533 U.S. at 629-31.

Similarly, *Snow* does not support the Sandbergs' claims because it involved temporary municipal easements granted by the prior owner. 512 P.3d at 371, ¶ 10. There, the court acknowledged that "[t]he general rule is that the right of inverse condemnation belongs to the owner at the time of the taking." *Id.* at 372, ¶ 7. The court found that because the easements were temporary, their claim didn't accrue until the easements expired. *Id.* at 372-73, ¶¶ 2-4. Neither case compels a different outcome here.

C. The Sandbergs' declaratory judgment is time barred for the same reasons.

The Sandbergs' request for declaratory judgment is derivative of their trespass and inverse condemnation claims and is time barred for the same reasons. The declaratory judgment claim does not merely seek quiet title; it seeks damages based on trespass and inverse condemnation:

- "Landowners are entitled to a judicial declaration and determination that the County's actions in the establishment of Sunset Road were contrary to Arizona law and that the County has no legal right to the continued use and maintenance of Sunset Road over and across the Properties or to assign, authorize or permit the use of Sunset Road by others, including use by TEP, Cox, and Verizon for commercial or other purposes." [ROA 10 ep 8, ¶ 35.]
- "Landowners are entitled to recover damages proximately caused by the County's improper actions and the improper use of the Sunset Road Alignment by the County, TEP, Cox, and Verizon." [*Id.* ¶ 36.]

Citing *Miller v. Dawson*, 175 Ariz. 610 (1993), the Sandbergs argue that there is no statute of limitation for a dispute over title to a road. [OB, 12/28/2023 ep 43.] The Sandbergs contend that they can always assert a quiet title claim, citing *City of Tucson v. Morgan*, 13 Ariz. App. 193 (1970), and *Gotland v. Town of Cave Creek*, 175 Ariz. 614 (1993). [OB, 12/28/2023 ep 43-44.] But none of those cases ruled on the statute of limitations. *See Dawson*,

175 Ariz. at 611, 613; *Morgan*, 13 Ariz. App. at 194-95; *Gotland*, 175 Ariz. App. at 615.

Moreover, the statute of limitations in a quiet title action is continuous only if the plaintiff "maintains undisturbed possession of the disputed property." *Rogers v. Bd. of Regents of Univ. of Ariz.*, 233 Ariz. 262, 266-67, ¶ 13 (App. 2013) ("[T]he statute of limitations does not run against a plaintiff in possession who brings a quiet title action purely to remove a cloud on the title to his property." (citation omitted)). "On the other hand, '[i]f the party's claim for quiet title relief can be granted only if the party succeeds on another claim, then the statute of limitations applicable to the other claim will also apply to the quiet title claim.'" *Id.* (citation omitted).

Here, the Sandbergs don't have "undisturbed" possession of the Sunset Road shoulder because they don't actually possess the disputed property free from interference. *Id.* The County paved Sunset Road by 1962 and has maintained it for decades. [ROA 90 ep 2-3, ¶¶ 13-14; ROA 92 ep 5, ¶¶ 8-9; ROA 93; ROA 115 ep 6.] At bottom, the County's maintenance has interfered with the Sandbergs' possession of the Sunset Road shoulder. The Sandbergs' declaratory judgment claim therefore is not continuous and can only be granted if they succeed on their inverse condemnation and trespass

claims. Like the Sandbergs' trespass and inverse condemnation claims, the statute of limitations on the Sandbergs' declaratory judgment claim for Sunset Road therefore began to run decades ago.

Their claims are time barred and the Court should affirm the grant of summary judgment on this basis.

D. The Sandbergs' statute of limitations arguments fail.

1. The Sandbergs have no claims for the utility tower.

The Sandbergs argue that accrual is a question of fact for the jury. [OB, 12/28/2023 ep 46-47.] But when the accrual of a cause of action "hinges solely on a question of law rather than the resolution of disputed facts," as here, the court may determine accrual as a matter of law. *Rogers*, 233 Ariz. at 265, ¶ 6.

The Sandbergs contend that A.R.S. § 12-821 does not bar their claims because their claims "focus on the actions of the Utility Defendants in 2019." [OB, 12/28/2023 ep 46-47.] They maintain that their claims are timely because they learned about the tower in May 2019 when the contractor installed a fence and a porta-potty. [*Id.* ep 47-48.]

But their complaint confirms that their claims against the Utility Defendants stem from the County's creation of Sunset Road. Their

declaratory judgment count alleges that "the rights of TEP, Cox, and Verizon to use the Sunset Road alignment *are dependent on the County properly acquiring title to said alignment*; TEP, Cox, and Verizon do not have any greater rights than the County to use the Sunset Road alignment or any of the Properties located within that alignment." [ROA 10 ep 7-8, ¶ 32 (emphasis added).] Their trespass count alleges that "TEP, Cox, and/or Verizon know and/or had employees or contractors who knew that *Sunset Road was not established in compliance with Arizona law* before filing any Application or request with the County." [*Id.* ep 10, ¶ 43 (emphasis added).] It's all about Sunset Road, but Sunset Road was created decades ago, and the claims lapsed long ago.

Moreover, the Sandbergs admit that the tower isn't on their properties. (*See* Argument § I.B.) It doesn't matter whether the tower's trespass is continuing or permanent because if the tower trespasses at all, it's on the Williamses' property, not the Sandbergs'. It also doesn't matter whether the County unconstitutionally took the property where the tower sits because the Sandbergs don't own that property. Finally, it doesn't matter that they're seeking quiet title to that property because they don't have an interest in the property abutting their neighbor's land.

2. The Williamses' claims are also barred.

The Sandbergs argue that the tower's encroachment on the Williamses' property is not time barred because even if the road is a permanent trespass, "this rationale does not apply to new or expanded uses." [OB, 12/28/2023 ep 50-51.] The Sandbergs cite no law supporting this assertion. Instead, they rely on the Restatement (Second) of Torts § 162, which provides that a landowner maintains a claim for trespass when "the conduct of the actor is a continuing trespass." But neither the road nor the tower constitutes a continuing trespass.

A utility tower is a permanent trespass for the same reason a road is: the tower, as it exists in its necessary form, creates a permanent injury. *See Rovey*, 250 Ariz. at 419, ¶ 18. A utility tower is not a "series of closely related wrongful acts." *Watkins*, 239 Ariz. at 171, ¶ 9. The tower's installation was a single act with a single impact on the land. Other jurisdictions agree that utilities are a permanent trespass. *See, e.g., City of Shawnee, Kan. v. AT&T Corp.*, 910 F. Supp. 1546 (D. Kan. 1995) (utility cable was permanent trespass); *Sycamore Fam., L.L.C. v. Vintage on the River Homeowners Ass'n, Inc.*, 145 P.3d 1177 (Utah Ct. App. 2006) (sewage pipes were permanent trespass).

Because a utility tower is a permanent trespass (if it's a trespass at all), any claim for it belonged to the owner at the time of the trespass. *See* Restatement (Second) of Torts § 162 cmt. e. The Sandbergs obtained an assignment of claims from the Williamses for all claims involving the tower on November 21, 2020, after this case began, and asserted the claims on behalf of the Williamses in October 2020. [ROA 117 ep 8; ROA 135 ep 1.] It is undisputed that the Williamses purchased the property in July 2020, *after the tower was built*. [ROA 95 ep 70-74; ROA 96 ep 91.] And the Williamses admitted that the prior owner, Mr. Eastman, didn't convey any claims to them. [ROA 95 ep 70-74; ROA 96 ep 70, 96.] The Williamses therefore have no trespass or inverse condemnation claims to assign. Moreover, parties cannot evade a limitations period by assigning a claim. An assigned claim has no longer shelf life than if the assignor had asserted it. *Stephens v. Textron, Inc.*, 127 Ariz. 227, 230 (1980) (claim barred by statute of limitations because "an assignee … can stand in no better position than the assignor").

III. There is no dispute of material fact that the County properly authorized the Utility Defendants to place a utility tower within the Sunset Road right-of-way.

On the merits, the superior court correctly ruled that A.R.S. § 40-283 and *Maricopa County v. Rovey*, 250 Ariz. 419 (App. 2020), allow the County to

include utilities within the right-of-way if: (1) the utility tower is within the easement's boundaries, and (2) the right-of-way existed before the landowner took title. [ROA 165 ep 2-3.] The court therefore ruled that the Sandbergs suffered no taking or trespass because the utility tower is within the County's right-of-way easement. This Court should affirm.

A. At a minimum, the County has a 60-foot right-of-way easement.

A central dispute about the parties' rights is the scope of the County's easement for the Sunset Road right-of-way. The "strips and gores" doctrine is the only basis for the Sandbergs to claim any rights to the unpaved shoulder, but the corollary to that doctrine gives the County a 60-foot right-of-way easement.

1. An abutting landowner owns to the centerline of the road subject to a public easement.

Under the "strips and gores" doctrine, "[i]f land abutting on a public way is conveyed by a description covering only the lot itself, nevertheless, the grantee takes title to the center line of the public way if the grantor owned the underlying fee." *Rovey*, 250 Ariz. at 423, ¶ 9 (quoting *Cottonwood/Verde Valley Chamber of Com., Inc. v. Cottonwood Pro. Plaza I*, 183 Ariz. 121, 124 (App. 1994)).

Under a well-established corollary rule to the strips-and-gores doctrine, the landowner's title to the centerline of the road is subject to an easement in favor of the public. Arizona adopted this easement corollary in *Rovey*. There, the landowners and the county disputed ownership of several public roads. 250 Ariz. at 423-24, ¶¶ 9-12. The county paved the roads adjacent to the landowners' property decades before the landowners took title. *Id.* at 422, ¶ 3. The deeds in the landowners' chain of title conveyed the property "except road." *Id.* The landowners asked the Court to apply the strips-and-gores doctrine to find that they held to the centerline of the roads in fee simple. *Id.* at 423, ¶ 9. The Court agreed that the landowners owned to the centerline but held that under the easement corollary, the "except road" clauses in the deeds "meant that the tract was subject to the easement for the right of way." *Id.* at 424, ¶ 10. The corollary, therefore, confirmed the "easements in favor of the County for the roadways." *Id.* at ¶ 12.

This easement corollary is widely accepted in other jurisdictions. *See, e.g.*, 12 Am. Jur. 2d *Boundaries* § 29 (2024) ("The established doctrine of the common law is that where the lands described in a conveyance are abutting, along or bounded by a way, street, highway, or road, the conveyance is deemed or presumed [to] pass title to the center of the abutting roadway,

subject to the public easement." (emphasis added; citations omitted)); *Sullivan v. Markowitz*, 658 N.Y.S. 2d 634, 634 (N.Y. App. Div. 1997) ("subject to the rights of other lot owners and their invitees to use the entire area of the street for highway purposes."); *Feig v. Graves*, 100 So. 2d 192, 196 (Fla. Dist. Ct. App. 1958) ("[A]butting property owner is presumed to own the soil to the center of the highway or street *subject to the easement in favor of the public*." (emphasis added)). The easement corollary applies even where the easement was not recognized before the dispute arose. *Rall v. Purcell*, 281 P. 832, 833 (Or. 1929) (noting except road language was "inserted for some purpose … [and] should be construed as a reservation of an easement").

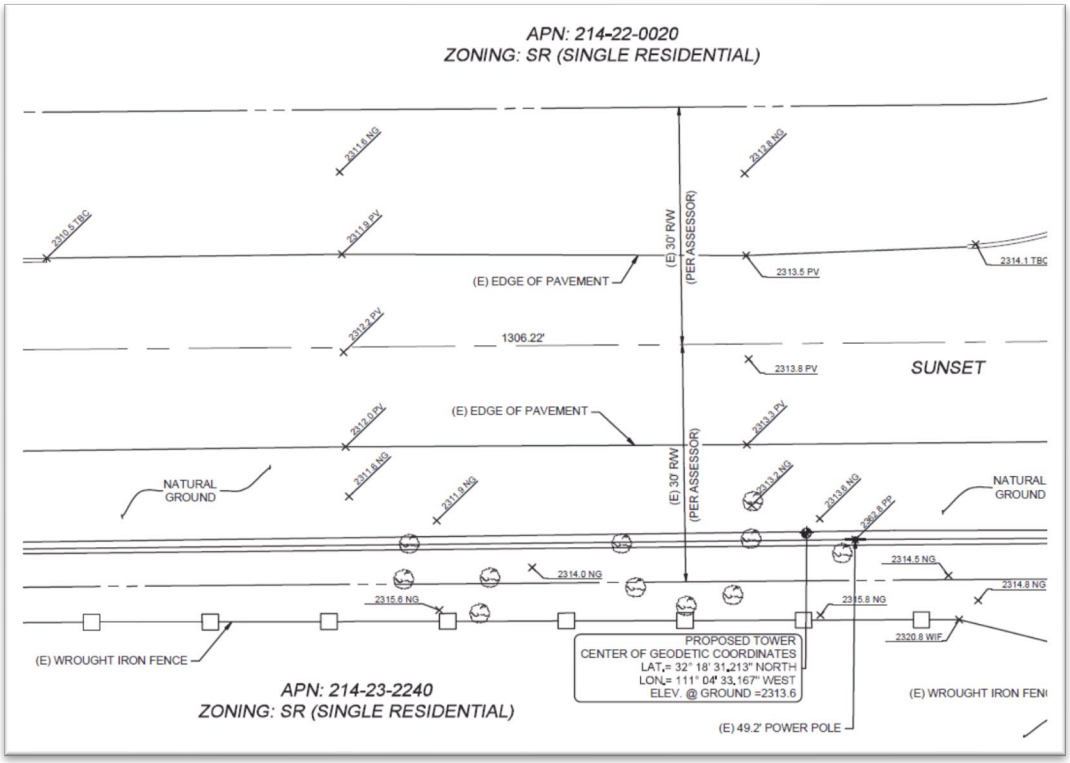
2. The strips-and-gores doctrine and its corollary rule apply.

(a) The Sandbergs' and Williamses' titles do not directly include any land within the 60-foot right-of-way.

The strips-and-gores doctrine and its easement corollary apply here because the deeds in the Sandbergs' and Williamses' chains of title expressly except Sunset Road.

As a threshold matter, the deeds in the Sandbergs' chains of title do not directly convey any portion of the 60-foot Sunset Road right-of-way. The legal description of the property in the 1973 deed conveyed the "East 660

feet of the South 660 feet of the North 690 feet." [ROA 95, ep 11-12.] This description excludes the northernmost 30 feet (690 feet – 660 feet = 30 feet), thereby creating a 30-foot-wide strip to the Sunset Road centerline. This 30-foot-wide strip creates half of a symmetrical 60-foot right-of-way, as shown below. (Because the road is symmetrical, the 30-foot strip on other side of the centerline creates the other half of the 60-foot right-of-way; the other half is not in dispute here.)



[ROA 115 ep 26.]

This same description continues in the deeds all the way to the Sandbergs'. The 1977 deed conveyed the "East 660 feet of the South 660 feet

of the North 690 feet." [ROA 95 ep 13.] The 1986 and 1998 deeds to the Sandbergs conveyed the "East 660 feet of the South 660 feet of the North 690 feet" and the "West 220 feet of the South 660 feet of the North 690 feet of the East 660 feet …" [*Id.* ep 16, 18.]

The same is true for the Williamses' deeds, which likewise use the "660 feet" and "690 feet" terminology. [*Id.* ep 70-73.]

The Sandbergs and the Williamses, therefore, did not directly acquire any part of the 60-foot Sunset Road right-of-way. Not the paved portion, and not the disputed unpaved shoulder.

To have any rights at all in this region, the Sandbergs must rely on the strips-and-gores doctrine, which gives them rights to the Sunset Road centerline.

(b) The strips-and-gores corollary confirms that a 60-foot right-of-way easement exists.

The strips-and-gores doctrine, however, comes with a corollary. As in *Rovey*, the Sandbergs' and Williamses' property rights are "subject to the easement for the right of way." *Rovey*, 250 Ariz. at 423, ¶ 10.

- Beginning with the 1952 deed from the original land patent owner and continuing through every single deed in the Sandbergs' chains of title, the deeds exclude Sunset Road. The 1952 deed conveyed the property "SUBJECT TO: … [e]stablished

and existing roads, highways and easements and *particularly West Sunset Road including the north 30 feet of said property*." [ROA 95, ep 9 (emphasis added).]

- The next deed, in 1973, conveyed "EXCEPT *any part thereof within the right of way of West Sunset Road*," and "[s]ubject to … all easements, restrictions, reservations, encumbrances, and other matters affecting said property of record in the office of the County Recorder of Pima County, Arizona." [*Id.* ep 11-12 (emphasis added).] As explained below, the 60-foot Sunset Road right-of-way was on record.

- The next deed, in 1977, similarly conveyed "[s]ubject to … all *easements*, restrictions, reservations, encumbrances, and other matters affecting said property of record in the office of the County Recorder of Pima County, Arizona." [*Id.* ep 13 (emphasis added).]

- The next deeds, to the Sandbergs in 1986 and 1998, each conveyed [s]ubject to … all easements, *rights of way*, encumbrances, liens, covenants, conditions, restrictions, obligations and liabilities as may appear of record." [*Id.* ep 16, 18 (emphasis added).]

- And again, same with the Williamses. Mr. Eastman conveyed to the Williamses subject to the same exceptions as the Sandbergs' deeds. [*Id.* ep 70-73.]

This means that the County has 60-foot right-of-way easement over Sunset Road in favor of the public. The easement is 60 feet wide because the deeds' exception is 30 feet wide to the centerline of Sunset Road (60 feet total when including the mirror half on the other side of the centerline). Additionally, the 1956 subdivision of land across the street dedicated Sunset Road, reflecting and creating a 60-foot right-of-way. [ROA 188 ep 3.]

The 1932 Sunset Road plat recorded in the Pima County Recorder's Office is also 60 feet wide. [ROA 95 ep 20-24.] This is what the deeds referenced by excluding the "north 30 feet of said property" in Sunset Road, "easements … of record in the office of the County Recorder of Pima County, Arizona," and "rights of way … as may appear of record." [*Id.* ep 9, 1-13, 16, 18, 70-73.]

The 1932 Sunset Road plat was the result of a 1930s petition by residents to establish a public road along their properties in accordance with the existing statutes at the time. [ROA 92 ep 3, ¶ 5; *id.* ep 7-24; ROA 115 ep 6.] *See* Revised Code of Ariz. § 11-1701 (1928) ("[H]ighways may be established, altered or abandoned by the presentation of a petition signed by ten or more resident taxpayers of the county, to the board of supervisors."). Consistent with the statute, the board of supervisors surveyed the proposed highway, provided notice to the affected residents, held hearings, and assessed just compensation. [ROA 92 ep 3-4 ¶ (6)(b)-(f); *id.* ep 12-18.] *See* Revised Code of Ariz. § 11-1701 (1928). The board passed a resolution establishing Sunset Road, and the 1932 plat reflecting the 60-foot right-of-way was recorded in the Pima County Recorder's office. [ROA 92 ep 4 6(g); *id.* ep 20-24.]

At very least, under the easement corollary to the strips-and-gores doctrine, these express exceptions confirm "easements in favor of the County for the roadway[]," which are 60 feet wide. *Rovey*, 250 Ariz. at 424, ¶ 12. Although the Sandbergs insist that they (or the Williamses) own the unpaved shoulder, the only way they could have such rights is via the strips-and-gores doctrine. But they cannot claim the benefits of that doctrine without accepting the easement corollary.

(c) Any defect in the statute used to establish Sunset Road is irrelevant to the claims at issue here.

Decades after the County established Sunset Road, the Arizona Supreme Court invalidated a portion of a statute similar to Revised Code of Ariz. § 11-1701 (the statute used to establish Sunset Road in 1930). *See McCune v. City of Phx.*, 83 Ariz. 98, 105 (1957). The statute at issue in *McCune* set the "just compensation" via an administrative process rather than via a jury as required by article 2, section 17 of the Arizona Constitution. *Id.* at 105. The Court therefore invalidated the "just compensation" portion of the statute but left the remaining provisions of the statute intact. *McCune*, 83 Ariz. at 106.

The Sandbergs argue that because Sunset Road was established pursuant to an unconstitutional statutory scheme like the statute at issue in *McCune*, Sunset Road was not properly established, and the County has no rights to Sunset Road. [OB, 12/28/2023 ep 17, 61.] Citing *Miller v. Dawson*, 175 Ariz. 610 (1993), they contend that the County cannot acquire highways by prescription. *Id.* at 612. [OB, 12/28/2023 ep 17, 61.]

Even if the Sandbergs' argument is correct, the county has rights to a 60-foot Sunset Road right-of-way even without the proceedings from the 1930s. Because the Sandbergs' and Williamses' deeds expressly exclude the right-of-way (in some cases mentioning Sunset Road by name), the strips-and-gores doctrine and its corollary—not prescriptive rights—confirm that the County has an easement.

The superior court correctly held that *Rovey* created "at minimum, an easement for road purposes to the County," and "there is no real dispute that the County has minimally, an easement for the right-of-way over Sunset Road." [ROA 192 ep 2-3.]

B. The County properly authorized the utilities to place a tower within the County's 60-foot right-of-way.

A.R.S. § 40-283 allows the County to authorize utility companies to place infrastructure within the right-of-way:

> A board of supervisors may authorize public service corporations, telecommunications corporations, cable operators or video service providers to construct a line, plant, service or system *within the right-of-way of any road*, highway or easement that is designated for access or public use by plat or survey of record of a subdivision, or of unsubdivided land as defined in § 32-2101, provided that any such authorization or construction pursuant to such authorization does not impose on the county the duty of maintaining the road or highway unless the county accepts the road or highway into the county maintenance system by appropriate resolution.

A.R.S. § 40-283(D) (emphasis added). This statute therefore expressly authorized the County to authorize the utility defendants to place a utility tower within the Sunset Road right-of-way.

The legislature had the authority to enact § 40-283(D) because a right-of-way easement includes utility access. For example, the Alaksa Supreme Court considered whether a "powerline [could] be constructed on a roadway easement without obtaining an additional interest from the owner of the land on which the easement lies." *Fisher v. Golden Valley Elec. Ass'n, Inc.*, 658 P.2d 127, 129 (Alaska 1983). There, the powerlines were constructed

pursuant to a statute providing that a "utility facility may be constructed, placed, or maintained across, along, over, under or within a state right-of-way only in accordance with regulations prescribed by the department and if authorized by a written permit issued by the department." *Id.* at 130 (quoting Alaska Stat. § 19.25.010). The court acknowledged that the statute did not provide any limits on the use or placement of the utilities. *Id.* Relying on Alaska Stat. § 19.25.010, the court found that the statute placed "Alaska among those states which permit powerline construction as an incidental and subordinate use of a highway easement." *Id.* The fact that the powerline was placed on an unused section of the easement did not change the court's result because a powerline "is a subordinate and less intrusive use" than a highway. *Id.*

Similarly, the Utah Supreme Court held that utility poles "are deemed a customary incidental use of the highways and are not considered an encroachment upon the right of an abutting property owner so as to entitle one to a right to compensation for an additional servitude." *Pickett v. Cal. Pac. Utils.*, 619 P.2d 325, 327-28 (Utah 1980). Utah also had a statute allowing utilities within a public easement. *Id.* at 326 (citing Utah Code § 17–5–39). Including utilities within a right-of-way easement makes sense, the court

reasoned, because a "dedication of land for highway purposes when made is deemed to comprehend not only specific uses in the minds of the parties at the time, but also those developed and invented, which fall into the category of transportation in the future." *Id.* at 327 (quoting *Fox v. Ohio Valley Gas Corp.*, 235 N.E.2d 168, 172–73 (1968)).

The Minnesota Supreme Court also relied on "settled law" to support its finding that the "transmission of intelligence" is "included within the public 'highway easement.'" *Cater v. Nw. Tel. Exch. Co.*, 63 N.W. 111, 112-13 (Minn. 1895). There, a statute authorized "[a]ny telegraph or telephone corporation organized under this title … to use the public roads and highways in this state, on the line of their route, for the purpose of erecting posts or poles on or along the same to sustain the wires or fixtures." *Id.* at 111 n.1 (quoting Minn. Stat. § 2641 (1894)). The court acknowledged that "for nearly 30 years" the legislature "assumed that this right existed," and "it has become settled law that the easement is not limited to the particular methods of use in vogue when the easement was acquired, but includes all new and improved methods, the utility and general convenience of which may afterwards be discovered ...." *Id.* at 112-13.

Although other jurisdictions have taken contrary approaches (e.g., *Brown v. Asheville Elec. Light Co.*, 51 S.E. 62 (N.C. 1905)), "the majority of courts considering the issue appear to have concluded that construction of a power line which does not interfere with highway travel is a proper use of a highway easement and is not regarded as imposing an additional burden or servitude on the underlying estate." *Nerbonne, N.V. v. Fla. Power Corp.*, 692 So. 2d 928, 929 (Fla. Dist. Ct. App. 1997); *accord Hall v. Lea Cnty. Elec. Coop.*, 438 P.2d 632, 635 (N.M. 1968) ("[B]etter reasoning supports the general rule that the construction and maintenance of an electric power or transmission line, within the boundaries of a public highway … do not constitute an additional burden or servitude."); *McCullough v. Interstate Power & Light Co.*, 300 P. 165, 166 (Wash. 1931) ("The easement acquired by the public in a highway includes every reasonable means for the transmission of intelligence, the conveyance of persons, and the transportation of commodities, which the advance of civilization may render suitable for a highway."); *see also* 3 Tiffany Real Prop. § 926 (3d ed.) ("When land is taken or dedicated for use as a highway, the taking or dedication should be presumed to be not merely for such purposes and uses as were known and customary, at that time, but also for all public purposes, present or

prospective, whether then known or not, consistent with the character of such highways and not actually detrimental to the abutting property.").

Arizona's statute, A.R.S. § 40-283(D), reflects this understanding that a roadway easement includes utilities because it merely requires a right-of-way, not fee ownership. *See Mountain States Tel. & Tel. Co. v. Kennedy*, 147 Ariz. 514, 515, n.1 (App. 1985) ("The grant of a right of way is an easement .... The term 'right-of-way' is merely descriptive of the easement rights." (citation omitted)). A.R.S. § 40-283(D) adopts the majority approach that a right-of-way includes utilities within its scope.

The superior court therefore properly held that because the County has a 60-foot easement over Sunset Road, the County had authority under § 40-283(D) to allow the placement of utilities within the right-of-way. [ROA 165 ep 2-4; ROA 192 ep 2-3.] The utility tower is within the County's right-of-way easement. [ROA 115 ep 26.] This disposes of the Sandbergs' claims on the merits. Because the County had valid authority to enable utilities to place utilities within the roadway easement, and because the County had a valid easement, the utility tower is not a taking or trespass. This Court should affirm.

C. The Sandbergs' remaining arguments lack merit.

1. A.R.S. § 40-283 applies because there's a plat.

The Sandbergs argue that A.R.S. § 40-283(D) doesn't apply because it supposedly requires a plat or survey *by an owner*, and no plat or survey exists. [OB, 12/28/2023 ep 35-36.] But A.R.S. § 40-283(D) doesn't require a plat or survey *by an owner*; it simply requires a "plat or survey of record." A.R.S. § 40-283(D). A plat designating Sunset Road for public use was recorded in 1932 (with a 60-foot right-of-way). [ROA 92 ep 20-24.] Surveys of record also designate Sunset Road, too. For example, the subdivision directly across the street from the Sandbergs' properties filed a survey creating the subdivision and dedicating Sunset Road in 1956 (with a 60-foot right-of-way). [ROA 188.]

2. A.R.S. § 40-283 does not violate constitutional or common-law principles.

The superior court found that *Rovey* created "at minimum, an easement for road purposes to the County," and "there is no real dispute that the County has minimally, an easement for the right-of-way over [Sunset Road]." [ROA 192 ep 2-3.] The Sandbergs do not dispute this on appeal. Instead, they distinguish between the paved and unpaved portions of the road. [OB, 12/28/2023 ep 50.]

The Sandbergs argue that the County, at most, has an easement for the paved portion of Sunset Road based on use. [OB, 12/28/2023 ep 40.] The County paved 30 feet (of the 60-foot) Sunset Road right-of-way no later than 1962. [ROA 90 ep 2-3, ¶¶ 13-14; ROA 93; ROA 115 ep 6.] Although there may be other bases for the County's rights to Sunset Road, the County has an easement for the full 60-foot right-of-way based on the strips-and-gores doctrine and its corollary. This doctrine does not rely on use; it relies on the deed's express exclusion of a road in the land description. Under the strips-and-gores doctrine and its easement corollary, the road's use is irrelevant.

Moreover, all the evidence shows that the right-of-way (and the easement created by the strips-and-gores corollary) is 60 feet wide:

- The 1932 Sunset Road plat recorded in the Pima County Recorder's office created a 60-foot right-of-way. [ROA 95 ep 20-24.]
- The deeds in the Sandbergs' and Williamses chains of title except all property within the 60-foot right-of-way. [*Id.* ep 9, 11-13, 16, 18, 70-73.]
- Official Pima County documents from 1962 and 2008 confirm the 60-foot right-of-way. [ROA 93 ep 2; ROA 94 ep 3.]

There is no genuine dispute that the Sandbergs and Williamses took their properties subject to the County's 60-foot right-of-way easement over

Sunset Road. The County's decision to pave only part of the right-of-way does not extinguish its right to the remainder of the easement.

Moreover, based on the legal descriptions on the deeds, the Sandbergs and Williamses do not even directly own the unpaved shoulder. The northern boundary line of their properties excludes Sunset Road and the unpaved shoulder. The superior court found that Sunset Road "existed as a public roadway for decades" before the Sandbergs and Williamses acquired titled to their properties—a fact they don't dispute on appeal. [ROA 192 ep 3.] The only way they have any property intertest in Sunset Road and its shoulder is under the strips-and-gores doctrine. But that doctrine's corollary creates an easement in favor of the County. The landowners cannot claim the benefits of the strips-and-gores doctrine without accepting its easement corollary. And without strips and gores, they would have no rights to the unpaved shoulder at all.

The Sandbergs' other arguments regarding on this issue all fail. First, they argue that the easement corollary doesn't apply because the deeds don't contain express road clauses. [OB, 12/28/2023 ep 21.] They contend that the only excepted road is Gerhart Road in the 1973 deed, and that road is one-half mile west. [*Id.*] The 1952 deed excepts Gerhart Road. [ROA 95 ep

9.] But it also excepts "[e]stablished and existing roads, highways and easements and *particularly West Sunset Road*." [*Id.* (emphasis added).]

Second, the Sandbergs argue that when TEP drew its 1993 service map the legal description of the Sandbergs' lot was described as the "full northern 690," which includes the Sunset Road centerline. [OB, 12/28/2023 ep 49.] A service map is not a deed, and a service map attached to a document in which the *Sandbergs* granted *TEP* a utility easement to their home does not expand their property rights beyond the undisputed deeds and chains of title.

Third, the Sandbergs cite to *Smith v. Second Church of Christ*, 87 Ariz. 400 (Ariz. 1960), for the proposition that "subject to" clauses do not convey any real interest in property. *Id.* at 408. [OB, 12/28/2023 ep 21.] But that case involved "subject to" clauses that were not part of the original deed. *Id.* Here, all the deeds in the Sandbergs' and Williamses' chains of title referenced Sunset Road or easements and rights-of-way recorded in the County Recorder's Office (where the 1932 Sunset Road plat was recorded).

Nor did *Rovey* limit its holding to the word "except," as the Sandbergs suggest. [OB, 12/28/2023 ep 21.] Instead, the Court acknowledged that the easement corollary applies where the deed does not include the road within

its legal description and "excepts" or "reserves" the road. *Rovey*, 250 Ariz. at 423-24, ¶¶ 10-11 (citation omitted). The Sandbergs' and Williamses' deeds exclude Sunset Road from the legal descriptions of the properties and convey the land "subject to" and "except any part thereof within" the Sunset Road right-of-way. [ROA 95 ep 9, 11-13, 16, 18, 70-73.] The easement corollary applies here.

Fourth, the Sandbergs argue that an easement holder cannot grant additional rights to third parties. [OB, 12/28/2023 ep 40.] But as explained above (Argument § III.B), a right-of-way easement includes utilities, and a municipality need not operate the utilities directly.

Fifth, the Sandbergs contend that § 40-283(D) applies only to "public service corporations" [OB, 12/28/2023 ep 50], but the statute refers to "public service corporations, telecommunications corporations, cable operators or video service providers." A.R.S. § 40-283(D).

None of the cases the Sandbergs cite acknowledge the strips-and-gores doctrine and its corollary. For example, the Sandbergs cite *DND Neffson Co. v. Galleria Partners*, 155 Ariz. 148 (App. 1987), where the court prevented all use of an easement when the easement holder built a shopping mall, and the easement would be used by patrons from an adjoining parcel. *Id.* at 149. But

that use expanded the scope of an easement granted only to the easement holder. *Id.* Here, by contrast, utilities do not expand the scope of an easement because a right-of-way easement already includes utilities.

The Sandbergs cite A.R.S. § 28-7382 for the proposition that the legislature recognizes that real property rights cannot be transferred to third-party utility providers without providing just compensation. [OB, 12/28/2023 ep 37-38.] A.R.S. § 28-7382(D) allows a property owner to seek "just compensation" if a utility structure placed within the right-of-way "expands the use of an existing easement" and "the expanded use reduces the fair market value of the property over which the easement" runs. First, this statute was enacted after the Sandbergs sued Defendants. *See id.* (effective September 29, 2021); 2021 Ariz. Sess. Laws, ch. 351, § 6 (1st Reg Sess.) (approved May 10, 2021). "No statute is retroactive unless expressly declared therein," A.R.S. § 1-244, so this statute does not apply here.

Second, this statute does not limit the County's authority to allow utilities within the right-of-way. Instead, it reinforces the core premise that a county may authorize utility companies to use the right-of-way. It simply provides a mechanism for just compensation if the property owner can show

that the utility structure diminished the property's fair market value. But the Sandbergs assert no claim under § 28-7382, nor could they.

The Sandbergs also argue that under *Miller v. Dawson*, 175 Ariz. 610 (1993), *City of Tucson v. Morgan*, 13 Ariz. App. 193 (1970), and *Gotland v. Town of Cave Creek*, 175 Ariz. 614 (1993), the County has no rights in the Sunset Road shoulder. [OB, 12/28/2023 ep 37-38.] Those cases acknowledged that public highways cannot be created by prescription, and statutes curing any defect in the establishment of public highways do not convey title to the County. *Dawson*, 175 Ariz. at 611, 613; *Morgan*, 13 Ariz. App. at 194-95; *Gotland*, 175 Ariz. App. at 615. But again, the strips-and-gores corollary, based on the deeds in the chains of title, gives the County an easement without relying on prescription.

Citing various cases holding that the government cannot convey title it doesn't own, the Sandbergs contend that because the County doesn't have any rights, it cannot grant any rights to the Utility Defendants. [OB, 12/28/2023 ep 38.] The County has not conveyed title. The County has a right-of-way that includes utilities, and statutory authority consistent with the common law enables it to authorize utility companies to place utilities.

A right-of-way easement includes utilities. (*See* Argument § III.B.) The County's actions therefore do not violate article 2, § 17, because the County did not take or interfere with any property rights the Sandbergs actually have. Moreover, although the Sandbergs do not challenge the constitutionality of the strips-and-gores doctrine, they could not do so in any event because that doctrine is the only thing that gives them any property rights at all in the shoulder.

D. The court did not err in dismissing the Sandbergs' declaratory judgment claim.

The Sandbergs argue that court improperly dismissed their declaratory judgment claim under A.R.S. § 12-1831 because declaratory relief is appropriate even when there are no other claims for relief. [OB 12/28/23 ep 52-53.] But the court retains discretion to "refuse to … enter a declaratory judgment" if the judgment wouldn't "terminate the uncertainty or controversy giving rise to the proceeding." A.R.S. § 12-1836.

Under this doctrine, the superior court did not err in dismissing the Sandbergs' request for a declaratory judgment. A declaratory judgment saying that the Sandbergs owned to the centerline of Sunset Road would not remove the utility tower. The tower is not on any land over which the

Sandberg's claim ownership interest, and the County's right-way-easement includes utilities. The court did not err in dismissing the Sandbergs' claim.

IV. The superior court correctly denied the Sandbergs' motion to amend their complaint.

A. Additional background on motion to amend.

The Sandbergs attempted to oppose summary judgment by pointing to supposed assignments of claims from Mr. Eastman and the Williamses. [*See* ROA 117 ep 3, 5, ¶¶ 2, 11; *id.* ep 8.] These supposed assignments could not salvage their claims as pleaded in the first amended complaint. So, after discovery closed and summary judgment was fully briefed and argued, the Sandbergs sought leave to file a second amended complaint. [ROA 135.]

In their proposed second amended complaint, the Sandbergs assert inverse condemnation, trespass, declaratory judgment, and nuisance and zoning claims on behalf of themselves and their assignees. [*Id.* ep 7-8, 21, ¶¶ 2, 67-69.] With respect to the assignment of claims, the Sandbergs allege that "Landowners are also the assignees of certain rights as to the property located east of the Sandberg Property and commonly known as 5245 West Sunset Road [Williamses' property]." [*Id.* ep 8, ¶ 2.] The Sandbergs explained that they were seeking "clarification of the nature and extent of

Plaintiffs' rights and title to the disputed area adjoining both their two parcels and the neighboring property to the East, *pursuant to a previously disclosed assignment*." [*Id.* ep 3 (emphasis added).]

The proposed second amended complaint clarifies that the Sandbergs are not seeking to interfere with the paved portion of Sunset Road; rather, they claim fee title, abutter's rights, or prescriptive rights to the Sunset Road shoulder. [*Id.* ep 8, 10, ¶¶ 3, 13.] The Sandbergs also add a nuisance and zoning claim, alleging that the County failed to follow mandatory zoning regulations and acted contrary to the Sunray Safety Project when installing the utility tower. [*Id.* ep 21-22, ¶¶ 69, 73.]

The Sandbergs sued on April 15, 2020. [ROA 2 ep 1.] Two days later they filed their first amended complaint. [ROA 10 ep 1 (filed Apr. 17, 2020).] The Sandbergs didn't mention the Williamses' assignment of claims in their first amended complaint because they didn't have an assignment from the Williamses. They did not obtain that assignment until November 21, 2020. [*See* ROA 117 ep 3, 5, ¶¶ 2, 11; *id.* ep 8.] But even after the Sandbergs obtained the Williamses' assignment, the Sandbergs waited almost *two years*—until after discovery closed and summary judgment was briefed—to try to file a

second amended complaint asserting claims on behalf of the Williamses. [ROA 135 (filed Oct. 21, 2022).]

The superior court rejected the Williamses' assignment of claims. [ROA 165 ep 4.] The superior court found that, unlike the Sandbergs (who purchased their properties decades before the utility tower was built), the Williamses purchased their property after the tower was built. [*Id.*] The superior court therefore found that the Williamses had no takings claims to assign because "[a] claim for inverse condemnation is personal and does not pass to a grantee unless the grantor expressly conveys it." [*Id.*]

The Sandbergs filed a motion to vacate or amend the court's judgment, arguing that the court's judgment was not final because the court failed to address their remaining claims in the proposed second amended complaint. [ROA 196 ep. 7.] The court acknowledged that it had implicitly denied the Sandbergs' motion to amend by rejecting the Williamses' assignment of claims. [ROA 2-S ep 4.]

B. Amendment of the Sandbergs' complaint is futile.

The decision to grant or deny a motion to amend is within the "sound discretion of the trial court," and this Court "will not overturn the trial court's decision on appeal absent a clear abuse of that discretion." *In re Estate*

of Torstenson, 125 Ariz. 373, 376 (App. 1980) (citation omitted). The superior court does not abuse its discretion in denying a motion to amend based on: (1) undue delay; (2) prejudice to the non-moving party; (3) futility of the proposed amendment; and (4) bad faith. *Id.* at 376-77. A proposed amendment is futile "when the proffered amendment could not affect the outcome of the litigation, that is, when on its face it is legally insufficient." *Id.* at 377 (citation omitted).

Here, the superior court acted well within its discretion in denying the Sandbergs' motion for leave to file a second amended complaint because the proposed amendment was futile. The Court should affirm.

Because the utility tower is not located on or next to the Sandbergs' properties (Argument § I.B), the only way the Sandbergs have standing to assert claims involving the installation of the tower on the Sunset Road shoulder is if they received an assignment of those claims from Mr. Eastman or the Williamses. But they didn't.

The Williamses assigned all claims involving the utility tower to the Sandbergs because the tower abuts their property. But the Williamses didn't have any claims to assign, so the court properly concluded leave to amend should not be granted.

The Sandbergs also rely on a purported assignment from Mr. Eastman, the Williamses' predecessor. But the Sandbergs never received an assignment from Mr. Eastman. This, too, fails to salvage their claims.

Because the Sandbergs have no independent standing to bring their claims and did not receive a sufficient assignment of claims from the Williamses or Mr. Eastman, the proposed amendment is futile and this Court should affirm the denial of the motion to amend.

1. The Williamses' assignment of claims did not give the Sandbergs' standing.

The Sandbergs obtained a written assignment of claims from the Williamses on November 21, 2020:

> We, Donald M. Williams and Leann Williams, husband and wife, hereby assign our claim for the 2019 installation of the large cell tower on Sunset Road and Sunray Drive against Verizon, Tucson Electric Power Company, Cox Communications, and Pima County to our neighbors Carl and Greeta Sandberg, Individually and as Trustees of the Sandberg Trust.

[ROA 117 ep 3, ¶ 2; *id.* ep 8.] The Sandbergs' proposed second amended complaint asserts inverse condemnation, trespass, declaratory relief, and nuisance and zoning claims on behalf of the Williamses. But as the superior court correctly found, the Williamses' assignment of claims does not revive

the Sandbergs' claims because the Williamses did not have any claims to assign. [ROA 165 ep 4.]

(a) The Williamses purchased their property after the utility tower was built, so they have no claim to assign.

"A claim for inverse condemnation is personal and does not pass to a grantee unless the grantor expressly conveys it." *Rovey*, 250 Ariz. at 425, ¶ 22; *accord Boyd*, 39 Ariz. at 159 ("[T]he damages belong to the owner at the time of the taking and *do not pass to a grantee of the land under a deed made subsequent to that time, unless expressly conveyed therein*.").

It is undisputed that the Williamses purchased Mr. Eastman's property in July 2020, after the tower was built. [ROA 95 ep 70-74; ROA 96 ep 91 (Q. "And that equipment was there when you—before you purchased the property. Is that right?" / A. "Correct.").] It is also undisputed that Mr. Eastman did not convey any claims to the Williamses in the deed. [ROA 95, ep 70.] The superior court followed settled law when it found that the Williamses had no takings claim to assign to the Sandbergs under *Rovey*. [ROA 165 ep 4.]

(b) The Williamses have no other claims to assign.

The Williamses also have no assignable trespass or declaratory judgment claims. The statute of limitations for claims against a public entity is one year. A.R.S. § 12-821. Claims against a public entity require a notice of claim "within one hundred eighty days after the cause of action accrues."[3] A.R.S. § 12-821.01(A). Under A.R.S. § 12-821.01(A), "the person" who has the claim must "file the notice of claim." *See Turner v. City of Flagstaff*, 226 Ariz. 341, 344, ¶ 13 (App. 2011), *abrogated on other grounds*, *Fields v. Oates*, 230 Ariz. 411, 415, ¶ 16 (App. 2012).

A cause of action accrues under A.R.S. §§ 12-821 and -821.01 when "the damaged party realizes he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality or condition which caused or contributed to the damage." A.R.S. § 12–821.01(B).

[3] The Sandbergs twice cite *Felder v. Casey*, 487 U.S. 131 (1988), for the proposition that a state notice of claim statute cannot defeat a claim under the U.S. Constitution. [OB, 12/12/2023 ep 47-48.] But this proposition is not relevant because the Sandbergs don't allege any claims under the U.S. Constitution.

Because the Williamses' trespass and declaratory judgment claims seek damages against the County, the Williamses were required to file a notice of claim. [*See* ROA 135, ep 18, ¶ 50 ("Landowners are entitled to recover damages proximately caused by … the improper use of the Unimproved Area Sunset Road Alignment by [Defendants] …."); *id.* ep 20, ¶ 60 ("As a direct and proximate result of the trespass [by Defendants] … Landowners have sustained … damages ….").] The Williamses knew about the installation of the utility tower at the latest by November 21, 2020 when they assigned their claims to the Sandbergs. Thus, to maintain their claims, the Williamses had to file a notice of claim before May 20, 2021. Although the Sandbergs presented evidence that the Sandbergs filed a notice of claim with *Mr. Eastman* when he owned the property in September 2019 [ROA 117 ep 33-40], the Sandbergs presented no evidence that the *Williamses* filed a notice of claim.

As "the person[s]" claiming damages, the Williamses had to file a notice of claim. By failing to do so, the Williamses' trespass and declaratory judgment claims against the County are time barred.

The Williamses' trespass claim against the Utility Defendants is also timed barred because the Sandbergs didn't assert the claims before the two-

year statute of limitation had run and is barred by the subsequent purchaser rule. (*See* Argument § II.D.2.)

The Williamses therefore have no claims to assign, and the proposed second amendment of the complaint based on this assignment is futile.

2. The Sandbergs did not receive an assignment of claims from Mr. Eastman.

The Sandbergs cannot revive their claims through a purported assignment of claims from Mr. Eastman because Mr. Eastman made no such assignment. [ROA 135 ep 7-8, ¶ 2; ROA 161 ep 11.]

During discovery, the Sandbergs admitted that they had no assignment from Mr. Eastman. Defendants asked the Sandbergs to admit that the Williamses' assignment of claims was the only assignment the Sandbergs received with respect to the Williamses' property. [ROA 159 ep 3.] The Sandbergs "admit[ted] that the Williams Assignment operates to allow Sandberg to 'stand in the shoes' of the Williams for the purposes of asserting certain claims within the Amended Complaint *and is the only such assignment of rights to Sandberg, to date, as it pertains to the 5245 Property*." [*Id.* (emphasis added).] This admission was dated June 11, 2021. [*Id.* ep 4.]

In opposition to Defendants' summary judgment motion, the Sandbergs included a declaration of Carl Sandberg dated July 22, 2022. [ROA 117 ep 3-6.] In his declaration, Mr. Sandberg once again acknowledged the written assignment from the Williamses, attaching the assignment as an exhibit. [*Id.* ep 3, ¶ 2; *id.* ep 8.] Mr. Sandberg also avowed that "Prior to the filing of the instant suit, Mr. Eastman told my wife and I to continue our administrative claims into Court, to handle it, and that he did not want to pay more fees." [*Id.* ep 5, ¶ 11.] Mr. Sandberg did not call this an assignment or include it in the same section in which he discussed the Williamses' assignment of claims. [*See id.* ep 3, 5, ¶¶ 2, 11.]

At oral argument on summary judgment, counsel for the Sandbergs stated for the first time that "there is evidence of assignment, effective assignment for both Williams and Eastman to Sandberg in this case," and "the assignment of the rights to that case are in writing and orally to Sandberg. That is beyond dispute." [RT, 9/19/22 ep 21-22, 24]. Meanwhile, counsel for Defendants, relying on the Sandbergs' admission, continued to acknowledge that the Sandbergs did not have an assignment of claims from Mr. Eastman. [*See id.* ep 10 ("it belonged to Eastman, who did not assign it to Williams … [a]nd it was never assigned to the Sandbergs").]

A month after the summary judgment oral argument, the Sandbergs filed their motion to amend. [ROA 135 (dated 10/21/22).] In the proposed second amended complaint, the Sandbergs brought claims on behalf of the "5245 Property" owners based on a previously disclosed assignment of claims. [*Id.* ep 3; *id.* ep 7-8, 21, ¶¶ 2, 67-69.] In opposing Sandbergs' motion to amend, the Utility Defendants asserted that the Sandbergs did not have an assignment from Mr. Eastman, citing an email discussion with the Sandbergs' counsel and the Sandbergs' June 11, 2021 admission. [ROA 148 ep 4 ("Plaintiffs' counsel later explained that as of the filing of the FAC, Plaintiffs did not represent the owners of the 5245 Property, nor did they hold an assignment of claims from their neighbors."); ROA 151 ep 5; ROA 159 ep 3.] On appeal, the Sandbergs again point to Mr. Sandberg's declaration to support the fact that they have an oral assignment from Mr. Eastman. [OB, 12/28/2023 ep 33.]

The Sandbergs admitted under Rule 36 that they did not have an assignment from Mr. Eastman. The Sandbergs cannot later file a conflicting affidavit in an attempt to revive their case. "Any matter admitted under [Ariz. R. Civ. P. 36] is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended." Ariz. R. Civ. P. 36(b).

Because the Sandbergs never sought to withdraw or amend this admission, the Sandbergs' failure to obtain an assignment from Mr. Eastman was "conclusively established." *See* Ariz. R. Civ. P. 36(b). Lacking evidence that Mr. Eastman assigned any claims to the Sandbergs, the Sandbergs cannot rely on Mr. Eastman's purported assignments to revive their claims in their second amended complaint. *See Walls v. Ariz. Dep't of Pub. Safety*, 170 Ariz. 591, 597 (App. 1991) ("While it is true that leave to amend a pleading is usually freely given, ... if the amended pleading could be defeated by a motion for summary judgment, [the court's] grant[ing] [of] leave to amend would be a futile gesture." (citation omitted)).

3. The court already granted summary judgment because a right-of-way easement includes utilities.

The Sandbergs' proposed second amended complaint is also futile because, like the first amended complaint, it is based on the placement of the utility tower on the Sunset Road shoulder. [ROA 135 ep 10, ¶¶ 14-15.] But the court granted summary judgment because under *Rovey* and A.R.S. § 40-283 the County's right-of-way easement includes utilities. [ROA 165 ep 2-3; ROA 192 ep 3.] The court therefore found that the Sandbergs had no claims for trespass or takings based on the tower's placement. Any claim arising

from placing the utility tower within the Sunset Road shoulder in the proposed second amended complaint is futile because the court already granted summary judgment on this issue. *See Walls*, 170 Ariz. at 597.

4. The Sandbergs do not have a prescriptive easement to the Sunset Road shoulder.

In their proposed second amended complaint, the Sandbergs allege that they have prescriptive rights in the Sunset Road shoulder based on two decades of adverse use for equestrian purposes. [ROA 135 ep 8, 16, ¶¶3, 41.] The superior court found that the Sandbergs' claim for prescriptive rights to the Sunset Road shoulder based on equestrian and pedestrian use was "fatally flawed" for two reasons. [ROA 165 ep 4.] First, the court held the Sandbergs' equestrian use was not exclusive but is shared by all horseback riders in Tucson. [*Id.*] "[M]ore importantly," the court found that the Sandbergs' use was not hostile to the County's use of the road and shoulder as a public right-of way. [*Id.*]

The County has a 60-foot right-of-way easement for Sunset Road. Any use by the Sandbergs of the Sunset Road shoulder was not adverse to the County's right-of-way easement. *See Calhoun v. Moore*, 69 Ariz. 402, 405 (1950) (acknowledging "[t]itle to public highways cannot be acquired by

private parties through adverse possession"). Amendment of the complaint to include a claim for prescriptive rights to the Sunset Road shoulder was futile.

5. The Sunray Project is irrelevant.

The Sandbergs also allege in the proposed second amended complaint that the utility tower violates their implied agreement with the County on the safety requirements of the Sunray Project. [ROA 135 ep 13, ¶ 29.] The Sunray Project was a 2008 grading project where the County, with the landowners' permission, reconfigured driveways and reduced the slope of the Sunset Road and Sunray Drive intersection for visibility purposes. [*Id.* ep 13-14, ¶ 30; ROA 118 ep 2.] The parties submitted evidence regarding the Sunray Project in response to Defendant's summary judgment motion. [ROA 94; ROA 116 ep 11-14, ¶¶ 20-32; ROA 118 ep 2-22.]

The Sandbergs argue that they allowed the County to reconfigure the entrance to their properties for the Sunray Project based on the understanding that no future developments along their properties would undermine the safety of the project. [OB, 12/28/2023 ep 19.] But nothing in the record suggests that the County told the Sandbergs that it would never improve the Sunset Road shoulder again.

The Sandbergs point to a note in the final plans that "[a]ny revisions made to these plans must be approved by Pima County Department of Transportation Field Engineering Department." [ROA 94 ep 4; ROA 118 ep 3.] But the Sandbergs present no evidence that the utility tower revised the Sunray Project plans. The Sunray Project was a 2008 road reconstruction. The utility tower came a decade later. Second, the Sandbergs' statement that clear zones "cannot be altered without express authorization by Pima County" [ROA 116 ep 9-10, ¶ 12], makes no sense because the *County* granted the license to place this tower. [ROA 119 ep 14-15.] The Sandbergs presented no evidence that the Sunray Project was an agreement between the Sandbergs and the County; instead, the Sandbergs admit that they participated in the County's plan. [*See id.* ep 57; *see also* ROA 135 ep 13-14, ¶ 30 (alleging that the "Landowners permitted the County to use a portion of their property in connection with the Sunray Project").].

The Sandbergs have not established that they could get any relief from an alleged breach of the Sunray Project plans. The Sunray-based amendments were futile.

In sum, ample bases support the superior court's finding that amendment of the complaint was futile. This Court should affirm the superior court's denial of the motion to amend.

C. Alternatively, the Sandbergs caused undue delay by waiting 2.5 years to amend their complaint.

In the alternative, the Court should affirm the denial of leave to amend for prejudicial delay. "Although mere delay is not justification in and of itself for denial of leave to amend, substantial prejudice to the opposing party is a critical factor used in determining whether an amendment should be granted. Such prejudice is the 'inconvenience and delay suffered when the amendment raises new issues or inserts new parties into the litigation.'" *Schoolhouse Educ. Aids, Inc. v. Haag*, 145 Ariz. 87, 91 (App. 1985) (affirming denial of leave to amend). This Court may affirm on any basis supported by the record. *Craven*, 236 Ariz. at 218-19, ¶ 5.

The Sandbergs sued in April 2020. [ROA 2 ep 1.] They obtained the Williamses' assignment November 21, 2020. [ROA 117 ep 8.] In April 2021, Defendants informed the Sandbergs of the need to file an amended complaint because they lacked standing to bring their claims. [ROA 148 ep 4; ROA 152 ep 5.] In May 2021, the Sandbergs agreed to file a second

amended complaint "in no more than a couple of weeks (hopefully on the order of days really, rather than on the order of many weeks)." [ROA 154 ep 2.] Yet they did not move to amend until October 21, 2022, almost two years after they obtained the assignment. [ROA 135 ep 1.]

The Sandbergs offered no justification for the delay, other than that discovery allegedly yielded "new" trespasses and they did not want to file multiple amendments. [ROA 151 ep 5; ROA 161 ep 3.] This justification does not excuse waiting to seek leave to amend their complaint until two and a half years into the case, almost two years after they received an assignment, and until after discovery closed and summary judgment was briefed. *See Torstenson*, 125 Ariz. at 377 (undue delay when the plaintiffs waited almost two years to file leave to amend without "compelling reason[s] for the delay"). That's two and a half years of litigation (and costs) based on claims that would have completely changed after discovery closed and the dispositive motions deadline passed. The Sandbergs' proposed complaint would unduly prejudice Defendants by inserting new parties and new claims. [ROA 148 ep 14.]

This basis, too, supports the superior court's decision to deny the Sandbergs' motion to amend. The court acted well within its discretion. This Court should affirm.

D. The Sandbergs do not show that the superior court abused its discretion in denying their motion to amend.

Citing *Uyleman v. D.S. Rentco*, 194 Ariz. 300 (App. 1999), the Sandbergs argue that delay alone is not a sufficient basis to deny leave to amend. *See id.* at 303, ¶ 11. [OB, 12/28/2023 ep 59.] But when the delay causes prejudice, this Court affirms denials of leave to amend for undue delay. *See, e.g.*, *Haag*, 145 Ariz. at 91.

The Sandbergs argue that additional trespass and zoning violations are relevant to their declaratory judgment claim and support their motion. [OB, 12/28/2023 ep 58.] But there aren't new trespass or zoning violations. The Sandbergs knew of potential zoning violations before they sued because they included it in their pre-suit notice of claim. [ROA 117 ep 33.] The "new" tower encroachment claim isn't new because the Sandbergs don't allege that the tower changed after the Williamses purchased their property. Even if the encroachment was recently discovered, the tower was built before the Williamses took title. Any trespass claim involving the tower belonged to

the prior owner. (*See* Argument § II.D.2.) This Court should affirm the superior court's denial.

ARCAP 21 NOTICE

Appellees request fees under A.R.S. § 12-341.01.

CONCLUSION

The Court should affirm.

RESPECTFULLY SUBMITTED this 8th day of March, 2024.

OSBORN MALEDON, P.A.

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CERTIFICATE OF COMPLIANCE

1. This certificate of compliance concerns:

☒ A brief, and is submitted under Rule 14(a)(5)

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☐ A motion for reconsideration, or a response to a motion for reconsideration, and is submitted under Rule 22(e)

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☐ An amicus curiae brief, and is submitted under Rule 16(b)(4)

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Dated this 8th day of March, 2024.

/s/ Eric M. Fraser
Eric M. Fraser

CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2024, the foregoing Answering Brief was served: via the Court's E-Filer system and a copy served via U. S. Mail and email to:

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Dated this 8th day of March, 2024.

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